



**Mugambi & 2 others v M'Mugambi (Civil Appeal 274 of 2019)
[2025] KECA 1235 (KLR) (27 June 2025) (Judgment)**

Neutral citation: [2025] KECA 1235 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 274 OF 2019
JW LESSIT, A ALI-ARONI & GV ODUNGA, JJA
JUNE 27, 2025**

BETWEEN

LUCIANO KIRUKI MUGAMBI 1ST APPELLANT

DANIEL KIOGORA MUGAMBI 2ND APPELLANT

ZACHARY MUTHIORA MUGAMBI 3RD APPELLANT

AND

SESARY GATOBU M'MUGAMBI RESPONDENT

(Being an appeal from the Judgment of the High Court at Meru (Gikonyo, J.) delivered on 17th December 2018 in Succession Cause No. 22 of 1995)

JUDGMENT

1. On 19th January 1995, the 2nd appellant petitioned for a grant of letters of administration for the Estate of M'Mugambi M'Rimberia, who died intestate on 6th May 1984. He listed Abothuguchi/U-Kaongo/1050 (Parcel No.1050) and Abothuguchi/U-Kaongo/580 (Parcel No. 580) as the deceased's assets. The dependants of the deceased, as identified by the 2nd appellant, included his wife, Veronica Gatiria M'Mugambi and his sons: Charles Kinyua Mugambi, Daniel Kiogora Mugambi, Luciano Kiruki Mugambi, Zachary Muthiora Mugambi and Naftary Gitonga Mugambi.
2. On the 28th May 2002, the grant was confirmed, and properties of the deceased distributed based on the proposed distribution of the estate assets by the 2nd appellant were as follows:

Abothuguchi/U-Kaongo/1050

Charles Kinyua Mugambi Daniel Kiogora Mugambi Luciano Kiruki Mugambi Zachary Muthiora Mugambi (in equal shares)

Abothuguchi/U-Kaongo/580



Naftary Gitonga Mugambi 2.15 acres Charles Kinyua Mugambi

Daniel KiogoraMugambi Lusiano Kiruki Mugambi Zakary Muthiora Mugambi (in equal shares)

3. On 23rd May 2007, the respondent applied for revocation of the grant on several grounds that; the 2nd appellant had concealed facts by replacing the respondent's name with that of the respondent's son, Naftary Gitonga Mugambi, and he had mismanaged the Parcel No.1050, subdividing it into five parcels (registered as No. 1620 to 1624) even though this land was explicitly intended for the respondent. Out of these subdivisions, three were registered in the respondent's name. Additionally, the 2nd appellant failed to distribute Parcel No. 580, which was specifically meant for subdivision among the other sons of the deceased.
4. In a further affidavit sworn on 22nd February 2010, the respondent stated that there was no consent to the application or that any consent given was improperly obtained and deficient due to a lack of notice to him, even though he was entitled to equal priority as the 2nd appellant. He also asserted that neither he nor his mother had been adequately provided for. Furthermore, he noted that Parcel No. 580, which was considered unproductive, had not been subdivided or distributed by the time of the suit. The 2nd appellant appeared primarily interested in allocating most of the land from Parcel No. 1050 to himself while neglecting to distribute Parcel No. 580, which remained registered in the deceased's name.
5. In a judgment delivered on 7th May 2010, the court (J. Kasango) held that the 2nd appellant (petitioner) should have obtained the consent of the other beneficiaries before filing the petition as provided for in Rule 7(7) of the Probate and Administration Rules.
6. The court further ordered that the grant issued and confirmed on 21st January 1998, and rectified on 28th May 2002, be revoked, and a fresh grant be issued to the respondent in this appeal, Sesari Gatobu M'Mugambi. Further notice was issued to Samuel Kiogora Mugambi, the registered owner of Abothuguchi/U/Kiango/621, and Zacharia Muthiora Mugambi, the registered owner of Abothuguchi/U/Kiango/1623, to show cause why the titles issued to them should not be cancelled.
7. The respondent applied for the confirmation of the grant and distribution of the estate on 19th August 2011. During the hearing by way of oral evidence, the respondent testified that his father, the deceased, left behind five sons, including himself, Charles Kinyua, and the three appellants. The deceased left two parcels of land namely; Parcel No.580 & Parcel No1050 and had explained how he intended to share his land; Parcel No.580 was to be shared equally between Charles Kinyua and the appellants, while Parcel No.1050 was allocated to the respondent because he had assisted the deceased in educating his brothers.
8. He further testified that initially, the entire family lived in Parcel No. 1050. After making his intentions known, the deceased and all the other sons relocated and settled on Parcel No. 580, where they constructed their homes, leaving the respondent on Parcel No. 1050. He confirmed that he continued to reside on Parcel No. 1050 and had no claim to Parcel No. 580, expressing a desire to remain there as his late father wished.
9. DW2, Raureria Kabugi Kinyua, the wife of Charles Kinyua (deceased beneficiary), testified that her husband passed away in 2011 and left her residing on Parcel No. 580 along with his other siblings, save for the respondent, who resides in Parcel No. 1050. That the 2nd appellant allocated her a portion of 1050 and wanted her to cut down the respondent's coffee which she declined, as that was contrary to the wishes of the deceased. She further testified before the husband died he gave her a letter containing his testimony regarding the two parcels of land as conveyed by their father. She urged the court to



subdivide Parcel No. 580 among herself and the appellants, leaving Parcel No. 1050 for the respondent, as it rightfully belonged to him.

10. DW3 Adriano Miriti, in his testimony, stated that the deceased was his village mate and clansman. In 1973, the deceased convened a meeting at his home, which his entire family attended. During this meeting, the deceased announced that he was bidding them farewell and was leaving his land, Parcel No. 1050, to Gatobu (the respondent) and that he would relocate to Parcel No. 580 land with his wife and other sons. At that time, the respondent was married and had children, while the other four sons were not married. The respondent continued to live on Parcel No. 1050 with his family, while the other sons resided on Parcel No. 580.
11. In its determination, the trial court found that the respondent's son could not lay a claim on the deceased's property while his father was alive. It further found that the deceased had gifted Parcel No. 1050 to the respondent as a gift inter vivos, and the only available property for distribution was Parcel No. 580, which was to be distributed equally to all the deceased's children other than the respondent. The share of the deceased son, the late Charles Kinyua Mugambi, would be inherited by his wife, Kaureria Kabugi Kinyua, who would hold it in trust for all of Charles's children in equal shares.
12. Aggrieved by the judgment, the appellants preferred an appeal to this Court. In their memorandum of appeal dated 4th October 2019, they listed seven (7) grounds, which we find to be repetitive. We take the liberty of summarising the issue for determination as being that the learned judge erred in both law and fact in holding that land Parcel No. Abothuguchi/U- Kaongo/1050 was gifted to the respondent inter vivos, and did not form part of the deceased's estate; therefore, it was not available for distribution: and that Court's decision was arrived at against the weight of the evidence.
13. The matter before us was disposed of by way of written submissions. Learned counsel, Mr. Gitonga, was present at the plenary hearing. The respondent's counsel had filed his submission but was absent.
14. Learned counsel for the appellants relied entirely on his written submissions and list of authorities, both dated 28th April 2023. He submitted that the High Court erred in holding that Parcel No. 1050 was a gift inter vivos, despite it still being registered in the name of the deceased. In support of this contention, he relied on the cases of re Estate of Etete Masakhalia (Deceased) (Succession Cause 923 of 2013) [2021] KEHC 8337 (KLR) & in re Estate of Godana Songoro Guyo (Deceased) [2020] KEHC 3970 (KLR) to support the proposition that, principally, any gift inter vivos should be backed by a memorandum in writing, and that the gift would be complete once title is issued in the name of the beneficiary of the gift. Learned counsel further argued, there was no written memorandum produced in evidence in support of the assertion that the deceased gifted the Parcel No. 1050 to the respondent during his lifetime, minutes of the alleged family meeting, and further, the letter supporting the respondent's claim was not authored by the deceased but the deceased's son.
15. Learned counsel in addition submitted that during cross-examination by the 3rd appellant, the respondent testified that his father did not give him land. It was also submitted that although DW3 testified that the deceased left Parcel No. 1050 to the respondent, he did not state that it was a gift to him. Learned counsel asserted that the mere fact that the respondent was shown the land and given permission to occupy and use it was not sufficient proof that the deceased had made a gift inter vivos. In support of this proposition learned counsel relied on the case of re Estate of Etete Masakhalia (Deceased) (Succession Cause 923 of 2013) [2021] KEHC 8337 (KLR), where the court held that the mere fact of being shown a piece of land, and permitted to occupy and use it, without more, is not adequate proof for a gift inter vivos.
16. Learned counsel contended further that no evidence was adduced to prove that the deceased had taken preliminary steps towards effectuating his alleged promise; he had not complied with the provisions of



the *Land Control Act* by applying and obtaining consent to transfer the land to the respondent; neither was there any evidence that the deceased had signed a transfer form to facilitate the registration of the land in the respondent's name.

17. Learned counsel further argued that the respondent and his witnesses did not adduce any evidence to show that the respondent developed the land after it was allegedly given to him by the deceased. That the respondent himself admitted in his application for confirmation of grant that the suit property was part of the deceased's estate, stating that the deceased had left behind two parcels of land: Parcel No. 1050 and Parcel No. 580.
18. In opposition, learned counsel for the respondent filed submissions dated 19th July 2023, wherein it was submitted that the trial judge had an opportunity to hear the evidence from all parties involved, after which he analysed the same and arrived at a well-reasoned decision which he urged this Court ought to uphold. In support, he relied on the case of *Mbogua Kiruga vs. Mugecha Kiruga & Another* [1988] KECA 122 (KLR), where this Court stated that in an appeal, the court cannot properly substitute its factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong.
19. Learned counsel discerned only one issue for this Court's determination: whether the gift inter vivos was proved. He urged that the gift inter vivos was proved at the trial court by way of oral evidence. In support of this assertion, he relied on the case of *Kagina vs. Kagina & 2 Others* (Civil Appeal 21 of 2017) [2021] KECA 242 (KLR), in which this Court held that a deceased person is at liberty to divest their property during their lifetime. And even where a gift is incomplete, such as the lack of completion of the transfer process, this in itself does not render the gift inter vivos invalid. It can be perfected by the grant holder if there is no contest over it, or sanctioned by a court where proven.
20. Learned counsel contended that the deceased took a substantial step during his lifetime to effectuate his intention when he moved out together with the entire family, save for the respondent, to Parcel No. 580 and allowed the respondent to occupy Parcel No. 1050 and never revoked the gift till his death. In support of this argument, learned counsel relied on *Halsbury's Laws of England*, 4th Edition, Volume 20(1) para 70, which provides that where the donor puts the donee in possession and allows him to build, the donee can call on the donor or his representative to perfect the gift.
21. This is a first appeal from the decision of the trial court; our mandate is to consider the evidence on record, analyse and evaluate it, bearing in mind that the trial court had the benefit of listening to and seeing the witnesses first-hand, and make an allowance for this. Ultimately, we must form our own independent opinion. This was espoused in the case of *Arthi Highway Developers Limited vs. West End Butchery Limited & 6 Others* [2015] e KLR, where the court cited the case of *Selle vs. Associated Motor Boat Co.* [1968] EA 123 and held as follows; -

“An appeal to this Court from a trial by the High Court is by way of retrial, and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”



22. Having considered the record, submissions filed by respective parties, case law cited, and the law, we are of the considered opinion that only one issue avails itself for the determination of this Court: whether the deceased gifted Parcel No. 1050 to the respondent as a gift inter vivos.
23. The following facts are undisputed; the deceased left behind a wife and five sons; during his lifetime he owned two properties; Parcel No. 580 & 1050; originally the entire family resided on Parcel No. 1050; in 1973 the deceased moved with his four sons and wife to Parcel No. 580; and left the respondent and his family living in Parcel No. 1050; at the time of the deceased's death Parcel No. 1050 remained registered in his name; the appellants built their homes in 580; whereas the respondent resides with his family in 1050 and claims to have developed the place.
24. Though we see three appellants, the tussle in this estate seems to be squarely between the 2nd appellant and the respondent. Interestingly, when the 2nd appellant initially applied for a grant of letters of administration, he left out the name of the respondent and instead included the name of the respondent's son. This was, however, rectified by the court upon the respondent's application for revocation of the grant. We also note that only one family member, the sister-in-law of the parties, testified for the respondent. None of the appellants testified.
25. The appellants' case is that both Parcel Nos. 580 and 1050 belong to the estate of the deceased and ought to be distributed to all his heirs, and though the respondent lived and continues to live on Parcel No. 1050, the same was never gifted to him by the deceased, as alleged. On the other hand, the respondent maintains that Parcel No. 1050 was gifted to him by the deceased inter vivos in 1973, as he had helped the deceased educate the appellants, and the appellants had not attended school. The deceased acted upon his intention by moving out of the property to live on Parcel No. 580, together with his wife and all his other sons. He has developed the property, whereas his siblings have lived on 580, where they built their homes and have settled therein. The respondent testified that his father had called two people, whom he relayed the information to: a neighbour, Andriano Miriti, and a clan member, M'Iburi. Andriano Miriti testified on the side of the respondent as OB3. He confirmed the respondent's position.
26. As this Court has stated in previous decisions, the ideal situation is where the gift inter vivos is complete. In the sense that it has been transferred to the name of the beneficiary, or steps have been taken to effectuate the intention, such as obtaining the consent of the necessary authority if needed, signing of the transfer form, or there is occupation. In the case of *Munyole vs. Munyole* (Civil Appeal 21 of 2017) [2022] KECA 373 (KLR) (18 February 2022), this Court stated:

“In order for the court to conclude that a deceased person had made a gift inter vivos to a beneficiary, evidence must be led to this effect. We note that the trial court considered this question and came to the conclusion that no evidence had been placed before it to show that the deceased had intended that each house should occupy the parcel of land that it was occupying at the time of his death.”

In the case of *Kagina vs. Kagina & 2 Others* (supra), this Court had this to say of a gift inter vivos:

“We have revisited that rival position on the record and agree with the position taken by the Judge that a deceased person has the capacity to divest himself of property during his lifetime known in law as gifts inter vivos, which in the Judge's opinion and correctly so in our view are not only protected under the Act but are also sanctionable by a court of law irrespective of whether they are perfect or imperfect. By perfect meant complete, meaning the transfer of the gift inter vivos in favour of the beneficiary was effected and completed during the lifetime of the deceased, while by imperfect meant the transfer of the gift in favour of the



recipient was incomplete as at the time of the demise of the deceased. As correctly observed by the Judge, lack of completion of the process of transfer does not of itself render the gift inter vivos invalid. It can be perfected by the grant holder if there is no contest over it, or alternatively sanctioned by a court where proven.”

27. In this instance, it is not disputed that the deceased relocated his entire family to Parcel No. 580 and left the respondent with his family in Parcel No. 1050. The respondent and his witnesses testified that the deceased had expressed a wish to gift Parcel No. 1050 to the respondent. The appellants failed to cross-examine the respondent and his witnesses. The appellants chose not to testify or call evidence to the contrary at the hearing. They cannot purport to adduce evidence at this stage or expect the court to believe the 2nd appellant's statement that was not produced as evidence at the hearing or tested by way of cross-examination, as he did not avail himself.

28. In paragraph 12 of his judgment, the trial judge stated: -

“The claim by the applicant is based on an incomplete gift since the property is not registered in her (sic) name. On this I am content to cite Halsbury’s Laws of England, 4th Edition Volume 20 (1) paragraph 67 where it is stated as follows with respect to incomplete gifts:

‘where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor’s subsequent conduct gives the donee a right to enforce the promise. A promise made by a deed is however binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.’”

29. The judge further stated:

“the subsequent acts of the donor may give right to the donee to enforce the imperfect gift. See what the same author (ibid) states in paragraph 70 that:

‘The subsequent acts of the donor may give the intended donee a right to enforce an incomplete gift. Thus if a donor puts the donee into possession of a piece of land and tells him that he has given it to him so that he may build a house on it, and the donee accordingly, and with the donor’s assent, expends money in building a house, the donee can call upon the donor or his representative to complete the gift.’

30. The trial judge in the end found that the deceased by leaving Parcel No. 1050 to the respondent and moving to Parcel No. 580 with his other sons, and by allowing the respondent to build a home on the said property, made his intention known. Therefore, the applicant had the right to seek that the incomplete gift be transferred to him.

31. The deceased proposed to move in with the rest of the family and stayed with them in Parcel No. 580, where his other sons had established their homes. His action created room for the respondent to build a house with his family on Parcel No. 1050 between 1973 and 1984, a period of 11 years. His intention was clear. He would not have allowed the appellant to develop a home if his intentions were otherwise. It is therefore immaterial that Parcel No. 580 is not as productive. As this Court stated in *Kagina vs. Kagina* (supra), a deceased person has the right to dispose of their property during their lifetime in any manner. Where a gift inter vivos is imperfect, it is sanctionable by the court.



32. The trial judge was spot on in arriving at his decision based on the facts and the authority cited. We agree with him. We therefore see no fault in the well-reasoned judgment of the trial court in declaring that the deceased had gifted Parcel No. 1050 to the respondent inter vivos, by cancelling the subdivisions of the said title, restoring the title, and directing that it be registered in the respondent's name.

33. The appeal is dismissed with costs to the respondent.

DATED AND DELIVERED AT NYERI THIS 27TH DAY OF JUNE, 2025.

J. LESIIT

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

